SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1885

UNITED TRANSPORTATION UNION GENERAL COMMITTEE OF ADJUSTMENT (On Property of Penn Central Company), 683 Broad Street, Columbus, Ohio,

Petitioner,

vs.

GEORGE P. BAKER, RICHARD C. BOND, JERVIS LANGDON, JR. and WILLARD WIRTZ, Trustees of the Property of PENN CENTRAL TRANSPORTATION COMPANY, Debtor,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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TABLE OF CONTENTS

	PAGE
OPINION BELOW	1
JURISDICTION	2
QUESTION PRESENTED FOR REVIEW	3
STATUTE INVOLVED	3
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	8
ARGUMENT	9
CONCLUSION	17

APPENDICES:

A—Opinion of the United States Court of Appeals for the Seventh Circuit	1a
B—Judgment of the United States Court of Appeals for the Seventh Circuit	11a
C—Order of the United States Court of Appeals for the Seventh Circuit Denying Rehearing	12a
D—Memorandum Opinion and Order of the United States District Court for the Northern District of Illinois, Eastern Division	13a
E—Excerpts from the Railway Labor Act (45 U.S.C. §151 et seq.)	17a

List Of Authorities Cited

Cases

Brotherhood of Railroad Trainmen v. Jacksonville Terminal Company, 394 U.S. 369, 378, 22 L.Ed. 2d 344, 89 S.Ct. 1109 (1969) 10

Detroit & Toledo Shore Line Railroad Company v. United Transportation Union, 396 U.S. 142, 24 L. Ed. 2d 325, 90 S. Ct. 294 (1969) 15, 16

Elgin, Joliet and Eastern Railway Co. v. Burley, 325 U.S. 711, 89 L.Ed. 1886, 65 S.Ct. 1282 (1945) 9

Trainmen v. Chicago, R. & I. Railroad Co., 353 U.S. 30, 35-39 (1957) 12

United Transportation Union v. Burlington Northern, Inc., 458 F. 2d 354, 357 (8th Cir. 1972) 12

United Transportation Union Local 63E v. Penn Central Co., 443 F.2d 131 (6th Cir. 1971), cert. den. 404 U.S. 938 ..... 2, 13

U.T.U. v. Penn Central, 443 F.2nd 131 (6th Cir. 1971), cert. den. 404 U.S. 938 8

Statutes

Railway Labor Act, 45 U.S.C. §§151-160 ..... 3, 6, 9

Title 28 U.S.C.A. Section 1254 (1) 2

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No.

UNITED TRANSPORTATION UNION GENERAL COMMITTEE OF ADJUSTMENT
(On Property of Penn Central Company),
683 Broad Street, Columbus, Ohio,

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vs.

GEORGE P. BAKER, RICHARD C. BOND, JERVIS LANGDON, JR. and WILLARD WIRTZ,
Trustees of the Property of
PENN CENTRAL TRANSPORTATION COMPANY, Debtor,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

OPINION BELOW

The opinion of the Court of Appeals has not been published at the time of preparation of this petition. A copy of the opinion is included as Appendix A.

JURISDICTION

Jurisdiction of this Court is invoked under Title 28 U.S.C.A. Section 1254 (1). The judgment was entered by the Court of Appeals for the Seventh Circuit on February 22, 1974 (Appendix B). A timely Petition for Rehearing was filed with the Seventh Circuit and an order denying this Petition was entered on March 21, 1974 (Appendix C).

This Court is specifically requested to assume jurisdiction because of the direct conflict between the decision of the Seventh Circuit in this case and the decision of the Sixth Circuit in the case of *United Transportation Union Local 63 E* v. *Penn-Central Company,* 443 F.2nd 131 (6th Cir. 1971), cert. den. 404 U.S. 938. This conflict involves the jurisdiction of the federal courts to enjoin an action in violation of the Railway Labor Act. On facts that were in all relevant aspects identical the Sixth Circuit and Seventh Circuit have reached opposite results. As described by the Seventh Circuit in this case the conflict arises as follows:

"With all due respect and deference to our brethren in the Sixth Circuit we think their decision misconceives the function of a federal court in the context of a major-minor dispute inquiry."

QUESTION PRESENTED FOR REVIEW

The question raised by this case is whether the District Court may assume jurisdiction to determine on the basis of the facts whether a major or minor dispute exists instead of relying on the Railroad's characterization of the dispute because that characterization is "on its face tenable."

STATUTE INVOLVED

Railway Labor Act, 45 U.S.C. §§151-160 (Appendix E).

STATEMENT OF THE CASE

This case was filed in the District Court for the Northern District of Illinois to enjoin the action of the Penn Central Railroad in abolishing the "crew board" at the Colehour Yard in Indiana. The Plaintiff, and Petitioner before this Court, is the United Transportation Union representing in this case approximately 125 trainmen employed at the Colehour Yard in Indiana. Respondents are Trustees of the Penn Central Railroad Company. For purposes of clarity, Petitioner will be referred to as "the Union" and Respondent as "Penn Central."

On February 1, 1969, the Penn Central unilaterally and without written notice to the Union removed the "crew board" from its Colehour Yard. The crew board was kept in book form and had been maintained at the Colehour Yard for approximately forty years prior to its removal.

The crew board was relied on by employees to ascertain the make-up of work crews, scheduled rest periods and the order in which employees were to report for work. It provided a workable system for proper exercise of seniority rights. Among other characteristics, it was readily available and subject to easy inspection by employees and was continuously updated and revised so that it was constantly kept current. When errors affecting seniority rights were discovered they were immediately and easily corrected on the face of the crew board. The crew board was maintained around the clock by the crew dispatcher at Colehour on the "A Trick" (or shift) and by crew clerks on the "B" or "C" Tricks.

Rule 8-B-1 of the agreement between the parties provided for maintenance of the crew board in the following terms:

> 8-B-1. Crew boards. Crew boards showing the order in which crews are to go out shall be maintained. At outlying points where a crew board attendant is not on duty throughout an entire calendar day, arrangements shall be made so that trainmen desiring information as to their standing on the crew shall be furnished such information.

After removal of the crew board the Penn Central moved the crew dispatcher from the Colehour Yard to the 59th Street Yard and began what it refers to as a "print-out system." Print outs are typed sheets of paper which

are prepared at the 59th Street Yard from I.B.M. cards and are posted at Colehour three (3) times a day. In preparing the print out sheets the crew dispatcher relied on information called in from the Colehour Yard or individual employees.

The practical problems created by the change to print outs were many. For instance: (1) Because of the lack of communication with the Colehour Yard, information on the print outs was sometimes erroneous or employees were personally telephoned at home and asked when they had checked off work (A. 45). (2) Print outs were sometimes posted late or not posted at all (A. 30, 39). (3) Errors could not be corrected on the print outs and men experienced more "runarounds" when employees of less seniority would be called in improper order (A. 65-71). (4) A change or vacancy on the extra list previously observable by a glance at the crew board could be discovered only by calling the crew dispatcher and relying on his examination of I.B.M. cards (A. 27, 56, 85). (5) The print out sheets were posted on a bulletin board and it was impossible to determine the work or overtime status of other trainmen after the print out for the previous day had been covered (A. 97-98).

Following removal of the crew board and faced with the threat of strike, the General Chairman of the United Transportation Union complained in writing, and other officials complained verbally, that removal of the crew board violated the agreement between the parties (A. 23-30). On July 2, 1971, the Union filed its complaint for injunctive relief. Jurisdiction was based on the original jurisdiction of the Federal Courts under U.S.C. Title 28, Sections 1331 and 1337 and it was alleged that the Penn

Central had unilaterally altered the status quo under the collective agreement in violation of U.S.C. Title 45, Sections 153 and 156.

The Penn Central filed a motion for judgment on the pleadings raising the question of jurisdiction of the Court. The Penn Central stated that the matter involved only a "minor dispute" under the Railway Labor Act involving interpretation of the contract because the print out system was merely another form of crew board. Building on this foundation, the Penn Central claimed that the sole jurisdiction rested in the Railway Adjustment Board under 45 U.S.C. Sections 153 and 156.

After briefs on this issue, the Honorable Judge Alexander J. Napoli ruled that a question of fact was presented as to whether a crew board had been maintained and whether its use had been discontinued. He stated that resolution of that factual question was essential to determine whether a major or minor dispute was involved. Judge Napoli denied the motion for judgment on the pleadings and stated his ruling as follows:

> ". . . After considering the arguments and authorities of the respective parties on this point, the court determines that the proper resolution of this question depends upon whether or not a crew board had been maintained at Colehour before February 1969; if it was, whether or not its use had been discontinued and from other evidence that may be presented. If the answers are in the affirmative then, without deciding the issue at this time, it is likely that the defendants attempted to alter the terms of the agreement. If the answers are in the negative then, again without deciding the issue at this time, it would appear that only a grievance is present. In the former,

this court may have jurisdiction, while in the latter, jurisdiction would rest with the Adjustment Board. Henceforth, this jurisdictional issue depends upon the resolution of the same factual question as prevents this court from granting judgment on the pleadings. Not until an evidentiary hearing on the merits can this court determine if it has jurisdiction nor which party should prevail on the merits. The only orderly manner to handle this matter is a trial upon the merits."

The case was tried before Judge Napoli on May 12, 1972, and the Court took the case under advisement. Following the death of Judge Napoli the case was assigned to Judge Richard B. Austin and by stipulation of the parties was decided on the basis of the transcript of the hearing, exhibits and briefs on file.

On September 15, 1972, Judge Austin entered his Findings of Fact, Conclusions of Law and Judgment Order (A. 129-134). He found that the print out system was not another form of crew board, as the Penn Central alleged, and that the removal of the crew board violated the collective bargaining agreement and created a major dispute under the Railway Labor Act. He ordered that the crew board be reinstated.

The case was then appealed to the Court of Appeals for the Seventh Circuit. After briefs and oral argument, the Court of Appeals, with one Judge dissenting, ruled that the District Court had improperly assumed jurisdiction and that the contractual defense by the Penn Central was "on its face tenable." The decision of Judge Austin was reversed with directions to dismiss the action (App. B). A timely Petition for Rehearing was filed and it was denied on March 21, 1974 (App. C).

SUMMARY OF ARGUMENT

The facts have shown that the removal of the crew board and substitution of the print-out system changed both the terms of the parties' collective agreement and the underlying working conditions of the employees affected by the change. Without questioning this factual basis for the finding that a major dispute was created, the Court of Appeals for the Seventh Circuit ruled that assumption of jurisdiction was improper because the Penn-Central initially raised a defense that was "on its face tenable."

In ruling against assumption of jurisdiction to ascertain the facts, the Seventh Circuit directly conflicts with the decision of the Sixth Circuit in *U.T.U.* v. *Penn Central*, 443 F.2nd 131 (6th Cir. 1971), cert. den. 404 U.S. 938, which sustained the assumption of jurisdiction under identical facts. It is urged that the standard created by the Seventh Circuit in this case will destroy the effectiveness of the Railway Labor Act as a tool for solution of major labor disputes.

ARGUMENT

This case concerns the propriety of the District Court's assumption of jurisdiction under the Railway Labor Act in the face of the Penn Central's assertion that its unilateral change in working conditions was permissible under its interpretation of the collective bargaining agreement. The basic jurisdictional question before the District Court was whether the Penn Central's unilateral removal of crew boards and institution of a print out system created a major or a minor dispute under the Railway Labor Act. In dismissing this case the Court of Appeals for the Seventh Circuit determined that only a minor dispute was created and that the District Court had erred in assuming jurisdiction.

The Railway Labor Act, as construed by this Court, identifies two distinct classes of dispute which may arise between a railroad and its employees. A "major" dispute as discussed in Section 6 of the Act (45 U.S.C.A. Section 156) arises when one party attempts to change an agreement affecting rates of pay, rules or working conditions. A "minor" or Section 3 (45 U.S.C.A. Section 153), dispute arises out of a grievance over the meaning of an existing agreement in a particular fact situation generally involving only one employee. *Elgin, Joliet and Eastern Railway Co.* v. *Burley,* 325 U.S. 711, 89 L.Ed. 1886, 65 S.Ct. 1282 (1945).

Section 6 of the Act requires that when a major dispute is involved the status quo shall be maintained and establishes in detail the procedure to be followed prior

to making any unilateral change in working conditions. This insures that the parties have an opportunity to negotiate. In *Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal Company,* 394 U.S. 369, 378, 22 L.Ed. 2d 344, 89 S.Ct. 1109 (1969) Justice Harlan summarized the procedure to be followed in a major dispute situation.

> "The Act provides a detailed framework to facilitate the voluntary settlement of major disputes. A party desiring to effect a change of rates of pay, rules, or working conditions must give advance written notice. Section 6. The parties must confer, Section 2 Second, and if conference fails to resolve the dispute, either or both may invoke the services of the National Mediation Board, which may also proffer its services sua sponte if it finds a labor emergency to exist. Section 5 First. If mediation fails, the Board must endeavor to induce the parties to submit the controversy to binding arbitration, which can take place, however, only if both consent. Section 5 First, 7. If arbitration is rejected and the dispute threatens substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service, the Mediation Board shall notify the President, 'who may create an emergency board to investigate and report on the dispute. Section 10. While the dispute is working its way through these stages, neither party may unilaterally alter the status quo. Section 2 Seventh, 5 First, 6, 10."

In a minor dispute situation, by contrast, the Act vests sole jurisdiction for interpretation of the agreement and resolution of any grievance with the National Railroad Adjustment Board. As a result, the Courts have no jurisdiction to enjoin a change in the status quo in a minor dispute situation.

The Union contends that the removal of crew boards created a major dispute as defined by the Act. The contract between the parties unequivocably provided that "crew boards showing the order in which crews are to go out shall be maintained."

The Penn Central does not deny that it failed to comply with the status quo provisions of the Act, but it asserts the defense that its removal of the crew board and substitution of a print out system was merely a matter of interpretation of the contract. It claims that print outs are another form of crew board under its interpretation of Section 8-B-1 of the agreement. As a result, it claims that removal of crew boards created only a grievance involving the meaning of "crew boards" under the contract.

This defense was initially raised in Penn Central's motion for judgment on the pleadings. In that motion the District Court was faced with the bare assertion by the Penn Central that removal of the crew board was permissible under its interpretation of the contract, thus creating a minor dispute beyond the jurisdiction of the court. Without attempting to interpret the contract, Judge Napoli perceived the precise threshhold factual question before the court as follows:

> ". . . the court determines that the proper resolution of this question depends upon whether or not a crew board had been maintained at Colehour before February 1969; if it was, whether or not its use had been discontinued and from other evidence that may be presented. If the answers are in the affirmative then, without deciding the issue at this time, it is likely that the defendants attempted to alter the terms of the agreement. If the answers are in the

> negative then, again without deciding the issue at this time, it would appear that only a grievance is present. In the former, this court may have jurisdiction while in the latter jurisdiction would rest with the Adjustment Board. Henceforth, this jurisdictional issue depends upon the resolution of the same factual question as prevents this court from granting judgment on the pleadings. Not until an evidentiary hearing on the merits can this court determine if it has jurisdiction nor which party should prevail on the merits. The only orderly manner to handle this matter is a trial upon the merits."

It is difficult to conceive of a dispute between a railroad and its employees where it is not possible to raise a contractual defense that the change in working conditions is permissible under one party's interpretation of the contract. Courts have consistently recognized, however, that the mere assertion of such a defense does not on its face establish the validity of the defense.

In *United Transportation Union* v. *Burlington Northern, Inc.*, 458 F. 2d 354, 357 (8th Cir. 1972) the Eighth Circuit stated that:

> "The test to be applied is that if the contract is reasonably susceptible to the interpretation sought by both the carrier and the union, the dispute is minor and within the exclusive adjustment jurisdiction . . ."

This Court in *Trainmen* v. *Chicago R. & I. Railroad Co.*, 353 U.S. 30, 35-39 (1957) suggested that the district court should ask whether the defense, that a change is based on a contract interpretation, is frivolous.

All previous tests, however, required that the district court make some initial evaluation of the facts to deter-

mine whether the defense is in fact frivolous or insubstantial. Judge Napoli in this case recognized that he could not decide the substance or frivolity of the Penn Central's claim that this was merely a dispute over the meaning of the word "crew board" without hearing the facts.

On trial the evidence overwhelmingly supported the findings that the print out system was not the same as a crew board and that it did not achieve the same purposes. In its findings of fact the district court listed seven significant differences between the crew board and the print out system. It found that the crew board was central to the exercise of seniority rights and that under the print out system men were unable to effectively exercise seniority rights or schedule work and rest periods. (A. 130-132).

This case closely parallels the case of *United Transportation Union Local 63E* v. *Penn Central Co.*, 443 F.2d 131 (6th Cir. 1971), cert. den. 404 U.S. 938 in which under similar circumstances the Penn Central removed the crew board from its Stanley Yard in Toledo, Ohio, and substituted a print out system. The Sixth Circuit Court after full review of the record affirmed the findings of the District Court and the conclusion that a major dispute was created. The Court emphasized the findings that:

> "The evidence does not reveal a mere dispute over the meaning of the language in the contract, for it clearly shows that the defendant's print outs are not just another form of crew board. They are not what a crew board is, and they do not do what a crew board does" 443 F.2d at 132.

When the Seventh Circuit reversed the instant case on jurisdictional grounds, it acknowledged that the facts in this case are "in all relevant aspects identical" to those

in the Sixth Circuit case. Curiously it did not challenge the detailed findings of fact showing that the print out system was not the same as a crew board. Instead, the Court proposed a completely new standard that a contractual defense shall be accepted if it is "on its face tenable." In criticizing the assumption of jurisdiction by the District Court and by the courts in the Sixth Circuit, it stated:

> "The Sixth Circuit gives considerable attention to what detail a crew board should contain and how the computer print outs fail to meet those requisites but no determination is made on the critical question in a major-minor dispute inquiry—whether the railroad's contractual defense is on its face tenable.
> In a similar vein the district court in the case at bar went into a detailed analysis of what a crew board should show and how the print outs fail to measure up to the expected criteria. And likewise, the district court failed to scrutinize the critical question of whether the railroad's contract claim is merely colorable."

It is well understood that the courts must not undertake to interpret the collective agreement. However, under the test used in this case, the District Court will be limited to acceptance of a cleverly worded defense without reference to the substance of the dispute. All courts which have considered the precise factual issue of this case have concluded that the Penn Central's contractual defense is without factual support. Since the facts show that a print out is not a crew board and does not do what a crew board does, the Penn Central's assertion that print outs are a form of crew boards is both frivolous and insubstantial even though the Seventh Circuit feels that the statement, is "on its face tenable."

Further application of the test proposed by the Seventh Circuit threatens to destroy the crucial status quo provisions of the Railway Labor Act. The prohibition of unilateral changes in the status quo in major disputes was instituted to prevent strikes in those situations most likely to give rise to strikes. If the railroad can now make unilateral changes in the highly volative areas of rates of pay, rules and working conditions and avoid court interference by raising some "tenable" explanation that it is interpreting the contract, no contractual term is secure. Similarly, the union has had no remedy when faced with unilateral changes, but to strike.

This Court has always recognized the crucial importance of strong status quo provisions of the Act. In the recent case of *Detroit & Toledo Shore Line Railroad Company* v. *United Transportation Union,* 396 U.S. 142, 24 L.Ed. 2d 325, 90 S. Ct. 294 (1969) Justice Black stated,

> "The Act's status quo requirement is central to its design. Its immediate effect is to prevent the union from striking and management from doing anything that would justify a strike. In the long run, delaying the time when the parties can resort to self-help provides time for tempers to cool, helps create an atmosphere in which rational bargaining can occur, and permits the forces of public opinion to be mobilized in favor of a settlement without a strike or lockout. Moreover, since disputes usually arise when one party wants to change the status quo without undue delay, the power which the Act gives the other party to preserve the status quo for a prolonged period will frequently make it worthwhile for the moving party to compromise with the interests of the other side and thus reach agreement without interruption to commerce."

In the *Shore Line* case, the railroad attempted to establish new outlying work assignments away from the principal yard. Although, the change was contrary to prior practice, such assignments were not covered by the agreement between the parties, and the railroad claimed that the status quo requirements applied only to those conditions covered in the agreement. This Court rejected such a strict construction of the status quo provisions of the Act and ruled that assumption of jurisdiction to enjoin the change was proper.

In the present case, the crew board has been a central element in the actual working conditions for forty years and its maintenance was expressly required by the agreement between the parties. By all logic a stronger necessity for maintaining the status quo was present than in the *Shore Line* case.

By a strange twist in reasoning, however, the Seventh Circuit in distinguishing Shore Line ruled that because in this case the parties attached so much significance to the crew board to require it in their agreement, the Penn Central could make a stronger claim that its position was "justified" by the contract. After discussing the *Shore Line* case the Court concluded that,

> "The instant situation is quite to the contrary. The contract is not silent with respect to crew boards. Section 8-B-1 is an express provision. Likewise, as previously demonstrated, it cannot be said that the railroad does not make a substantial claim that its position is justified by the existing contract."

Under this reasoning, the contractual requirement that the crew board be maintained ironically supplies the justification for its removal.

In final analysis, the Seventh Circuit has introduced a new standard which imposes the strictest possible construction on the status quo provisions and seriously threatens the ability of the Railway Labor Act to avoid conflict resulting from unilateral charges. On the same facts, the Seventh Circuit has reached a result which is directly contradictory to the decision by the Sixth Circuit. It is respectfully urged that the proposed standard which would avoid review of the facts is in error.

CONCLUSION

For the foregoing reasons, it is respectfully urged that this Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit be allowed.

Respectfully submitted,

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APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

SEPTEMBER TERM, 1973 SEPTEMBER SESSION, 1973

UNITED TRANSPORTATION UNION GENERAL COMMITTEE OF ADJUSTMENT (On Property of Penn Central Company), 683 Broad Street, Columbus, Ohio,
Plaintiff-Appellee,

No. 72-1955 v.

GEORGE P. BAKER, RICHARD C. BOND, JERVIS LANGDON, JR. and WILLARD WIRTZ, Trustees of the Property OF PENN CENTRAL TRANSPORTATION COMPANY, Debtor,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 71-C-1606

Richard B. Austin, Judge.

ARGUED SEPTEMBER 25, 1973 — DECIDED FEBRUARY 22, 1974

Before SWYGERT, *Chief Judge,* KNOCH, *Senior Circuit Judge,* and CAMPBELL*, *Senior District Judge.*

* Senior District Judge William J. Campbell of the Northern District of Illinois is sitting by designation.

SWYGERT, *Chief Judge.* The trustees of the Penn Central Transportation Company appeal from a decree granting the plaintiff, United Transportation Union, an injunction restraining the defendant railroad from replacing an asserted "crewboard" with computer print-outs.

The union's claim was that the substitution of "print-outs" for the prior system of notifying railroad employees of work assignments was a unilateral change of the collective bargaining agreement between the union and the railroad, and accordingly gave rise to a "major dispute" between the parties as delineated in section 6 of the Railway Labor Act. 45 U.S.C. § 156. If the union's position is correct, there would be no question but that the district court had jurisdiction to issue injunctive relief to maintain the status quo in the face of a "major" or section 6 dispute. The railroad asserts that its actions were within the purview of the parties' collective bargaining agreement and that at most the instant action involves differences arising out of the interpretation of the collective bargaining agreement, that is, a "minor" or section 3 dispute. 45 U.S.C. § 153. In a minor dispute the district court's assumption of jurisdiction to grant injunctive relief would in general be inappropriate; rather, such a dispute should be deferred to the special competence of the adjustment board, the arbitration machinery specifically mandated by the Railway Labor Act in such circumstances. The threshold question in this action is whether a major or minor dispute is presented by the facts. We find that the circumstances created a minor dispute.

I

The pertinent section of the collective bargaining agreement provided:

> 8-B-1. Crew boards. Crew boards showing the order in which crews are to go out shall be maintained. At outlying points where a crew board attendant is not on duty throughout an entire calendar

day, arrangements shall be made so that trainmen desiring information as to their standing on the crew shall be furnished such information.

Prior to the latter part of 1968, the railroad carried out the crew calling function at the Colehour Yard, located near Whiting, Indiana, by providing a crew dispatcher on the first trick (shift) and yard clerks on the second and third tricks. The crew board at the Colehour Yard consisted of records kept in the form of mimeographed sheets of paper containing a list of regular assignments, one list for each trick. Accompanying the mimeographed lists was a handwritten list of men on the "extra list" who were called as needed. All these records were maintained in ledger books on the second floor of the yard office at Colehour Yard. The records were available for inspection by individual employees who desired to check them. In addition to these crew sheets, and the more frequent mode of obtaining information on their status, the employees kept themselves advised of their status by telephone calls to the crew dispatchers or clerks assigned to Colehour Yard. Moreover, the calling of crews for assignments was done by telephone by the crew dispatcher or clerks.

In the latter part of 1968, the railroad made the disputed change in the crew calling function. The change consisted, primarily, of discontinuing the use of the mimeographed and handwritten crew sheets and substituting in their stead computer print-out lists showing the standing of crews and extra men. The crew dispatcher's function at Colehour was consolidated with that of the crew dispatcher's at the 59th St. Yard in Chicago, the principal center of crew dispatching activities for the Chicago area. At the Colehour Yard the print-out sheets were posted three times a day prior to the change of shifts, the information emanating from the 59th St. Yard. The "print-out" sheets purportedly contained the same information as the former crew sheets, namely, a list of

regular assignments, a list of extra men and information as to where the extra men worked. As before, the employees at the Colehour Yard could contact the crew dispatcher at the 59th St. Yard by telephone to be advised on their standing, and this method continued to be the primary way in which the employees kept current as to their status.

The effective date of the changeover in crew calling functions was February 1, 1969. Following the changeover, union officials complained orally on various occasions about the manner in which the crew calling function was being handled at Colehour. Various complaints were registered by the union about the adequacy of information being posted and the timeliness of the postings. At no time, however, were steps taken by the union to process the alleged violation of section 8-B-1 through the established grievance procedure. Two and a half years later, on July 2, 1971, the union filed its complaint in the district court seeking injunctive relief, requesting that the crew calling function be reverted to its previous form prior to February 1, 1969. The union grounded its claim for relief on the contention that the substitution of print-out sheets represented a unilateral change by the railroad of the terms of their collective bargaining agreement with the union plaintiff and created as such a major dispute.

II

The fundamental inquiry in deciding whether to assume jurisdiction to grant injunctive relief is not to interpret the contract; rather, the court must decide whether the asserted countractal defense is frivolous.

Various tests have been applied by the courts as an aid to determining whether a major or minor dispute is present. In *United Transportation U.* v. *Burlington Northern, Inc.*, 458 F.2d 354, 357 (8th Cir. 1972), the Eighth Circuit declared that, "the test to be applied is that if the contract is reasonably susceptible to the interpretation sought by both the carrier and the union, the dispute

is minor and within exclusive adjustment jurisdiction...." The United States Court of Appeals for the First Circuit in *Airline Stewards & S. Ass'n, Local 550* v. *Caribbean Atl. A., Inc.*, 412 F.2d 289, 291 (1st Cir. 1969), quoted with approval the test enunciated by the District of Columbia Circuit in *Southern Ry. Co.* v. *Brotherhood of Locomotive Firs & Eng.*, 384 F.2d 323, 327 (D.C. Cir. 1967):

> [W]e think that, where the railroad asserts a defense based on the terms of the existing collective bargaining agreement, the controversy may not be termed a "major" dispute unless the claimed defense is so obviously insubstantial as to warrant the inference that it is raised with intent to circumvent the procedures prescribed by §6 for alteration of existing agreements.

In *Switchmen's Union of North America* v. *Southern Pacific Co.*, 398 F.2d 443, 447 (9th Cir. 1968), the Ninth Circuit stated the test in the negative:

> It is true, as the union points out, that a controversy, although couched in terms of a disagreement as to interpretation of a contract, may under some circumstances be regarded as a major dispute. This result may be reached if it can be said that the change being imposed by one side on the other is in nowise contemplated or arguably covered by the agreements.

Analyzed in the light of any of these tests it is apparent that the railroad's contractual defense, namely, that the substitution of print-outs for the prior system of crew calling was in compliance with section 8-B-1 of the parties' collective bargaining agreement, is not frivolous and that this dispute involves nothing more than a minor dispute, a dispute as to the interpretation and application of the existing agreement.

The agreement between the parties as to the nature of crew boards was framed in quite general terms:

> Rule 8-B-1. Crew boards. Crew boards showing the order in which crews are to go out shall be maintained . . . .

Nothing was stated in the agreement as to the specific nature and substance of a crew board. Prior to the substitution of print-outs the crew board at Colehour was nothing more than a bounded ledger book of mimeographed and handwritten sheets kept on the second floor of the yard house. Can it be said that the railroad's change to print-outs was not contemplated or arguably covered by the agreement? Is the railroad's contention that the print-outs are crew boards within the terms of section 8-B-1 so strained that it can be said that 8-B-1 cannot be reasonably susceptible to that interpretation? Is the railroad's assertion so frivolous and so obviously insubstantial as to warrant the inference that it is raised with intent to circumvent the procedures prescribed by section 6 for alteration of existing agreements? We find that the railroad's substitution of print-outs is clearly within the realm of a good faith, reasonable interpretation of section 8-B-1 of the collective bargaining agreement. It does not follow, however, that this interpretation will be found to be correct. That is a matter for the adjustment board to determine in the light of its expertise and experience with matters relating to the railroad industry.

The union grounds its case on the decision of the Sixth Circuit in *United Transport Union, L. 63E* v. *Penn Central Co.*, 443 F.2d 131 (6th Cir. 1971), and the district court below utilized that case to arrive at its decision granting the union injunctive relief. The facts in that case were in all relevant aspects identical to those presented here. The Sixth Circuit affirmed the district court's grant of injunctive relief to the union, restraining the railroad's substitution of print-outs for the former method of crew calling. The Sixth Circuit held that the substitution of print-outs was a unilateral change of working conditions giving rise to a major dispute. With all due respect and deference to our brethren in the Sixth Circuit,

we think their decision misconceives the function of a federal court in the context of a major-minor dispute inquiry: the task is not to interpret the contract; rather, it is to determine whether the contractual defense is frivolous. *Airlines Stewards & S. Ass'n, Local 550* v. *Caribbean Atl. A., Inc.,* 412 F.2d 289, 291 (D.C. Cir. 1969), The Sixth Circuit gives considerable attention to what detail a crew board should contain and how the computer print-outs fail to meet those requisites; but no determination is made on the critical question in a major-minor dispute inquiry—whether the railroad's contractual defense is on its face tenable.

In a similar vein the district court in the case at bar went into a detailed analysis of what a crew board should show and how the print-outs fail to measure up to the expected criteria. And likewise, the district court failed to scrutinize the critical question of whether the railroad's contract claim is merely colorable.

It is argued by the union that our recent decision in *United Transp. U., Lodge No. 621* v. *Illinois Terminal R. Co.,* 471 F.2d 375 (7th Cir. 1972), supports the district court's decision. That decision is inapposite. Unlike the case here, there the union served a section 6 notice on the railroad six months prior to the railroad's unilateral attempt to effect new work assignments, during which time the parties characterized and treated the dispute as a major dispute. More significantly, the collective agreement between the parties was silent about work starting points and did not preclude or support the railroad altering the location of work assignments, a situation identical to the Supreme Court's decision in *Detroit & Toledo Shore Line R.R.* v. *United Transportation Union,* 396 U.S. 142 (1969). Relying on *Shore Line,* we found that a major dispute existed under the circumstances. The concurring opinion found a major dispute due to the fact that the railroad's actions were admittedly outside the coverage of the contract, that is, neither the railroad nor the union

could make a substantial claim that its position was justified by the existing contract. 471 F.2d at 380. The contract was silent. The instant situation is quite to the contrary. The contract is not silent with respect to crew boards. Section 8-B-1 is an express provision. Likewise, as previously demonstrated, it cannot be said that the railroad does not make a substantial claim that its position is justified by the existing contract. Accordingly, we are not constrained by our decision in *United Transp. U., Lodge No. 621* v. *Illinois Terminal R. Co.*

In sum we hold that the instant case presents a section 3 dispute. All that is at issue is the interpretation of an existing contract provision. *See Elgin, J. & E. Ry. Co.* v. *Burley,* 325 U.S. 711, 723 (1945). This dispute is the type of small or minor difference which seldoms leads—or should lead—to a labor strike and for which the arbitration machinery of the Railway Labor Act was specifically designed. 325 U.S. at 724. The district court failed to stay its hand and erroneously entertained this action granting injunctive relief. *Order of Conductors* v. *Pitney,* 326 U.S. 561, 567 (1946); *Slocum* v. *Delaware, L. & W. R. Co.,* 339 U.S. 239, 243 (1950).

The injunctive decree is reversed with direction to dismiss the action.

CAMPBELL, *Senior District Judge,* dissenting:

Section 8-B-1 of the Collective Bargaining Agreement provides that "crew boards showing the order in which the crews are to go out shall be maintained." For approximately forty years prior to the substitution of "print-out" sheets, the defendant had maintained a "crew board" in book form at its Colehour Yard. Effective February 1, 1969, the railroad unilaterally and without written notice removed this "crew board" and substituted print-out sheets in its place. The majority maintains that the railroad's bare assertion that print-out sheets are crew boards "is clearly within the realm of a good faith, reasonable

interpretation of Section 8-B-1," and that what is here involved is no more than a dispute over contract interpretation. From this premise, the majority concludes that the instant case presents a section 3 dispute, thus depriving the district court of jurisdiction.

The district court entered detailed findings of fact regarding the characteristics of, and the information provided by, the original crew board, and also made findings of fact regarding the inadequacy of the print-out sheets as a substitute. The majority has concluded that this "detailed analysis of what a crew board should show and how the print-outs failed to measure up to the expected criteria" should not have been made. It is with this conclusion that I respectfully disagree.

I am convinced that the district court, following the Sixth Circuit's lead in *United Transportation Union* v. *The Penn Central Company*, 443 F.2d 131 (6th Cir. 1971), was correct in assuming jurisdiction for the purpose of conducting a full evidentiary hearing. The contract clearly requires that crew boards be maintained, and there is no doubt that the railroad unilaterally discontinued use of the Colehour crew board in the form which had been employed for approximately forty years. A major dispute was thus created by the railroad's action *unless* the print-outs can be said to constitute a crew board, for if they do not, it follows that crew boards have not been maintained at the Colehour Yard since February 1, 1969.

The evidentiary hearing was therefore held not to "interpret" the contract, but rather to determine whether the railroad had initiated a unilateral change in the contract. This determination could only be made on the basis of a "detailed analysis" designed to ascertain whether the computer print-outs could reasonably be considered to constitute a crew board. I fail to see any basis for assuming the reasonableness of the railroad's bare assertion that the print-outs constitute a crew board, until such time as the district court has had an opportunity to deter-

mine the adequacy of the print-outs as a substitute for the crew board formerly maintained.

In essence, the district court found that the use of print-outs so thoroughly failed to achieve the purposes for which crew boards had formerly been maintained that the print-outs could not be said to constitute a crew board within the meaning of Section 8-B-1.[1] The district court therefore properly found that the railroad had made a unilateral change in the contract by discontinuing use of the original crew board, thus creating a major dispute.

According, I would affirm.

A true Copy:
Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

[1] As the district court found in United Transportation Union v. Penn Central Company, supra, "The evidence does not reveal a mere dispute over the meaning of the language in the contract, for it clearly shows that the defendant's print-outs are not just another form of crew board. They are not what a crew board is, and they do not do what a crew board does." See, 443 F. 2d at 132.

APPENDIX B

In the United States Court of Appeals

For the Seventh Circuit

February 22, 1974

Before

Hon. LUTHER M. SWYGERT, *Chief Judge*
Hon. WIN G. KNOCH, *Senior Circuit Judge*
Hon. WILLIAM J. CAMPBELL, *Senior District Judge*

UNITED TRANSPORTATION UNION GENERAL COMMITTEE OF ADJUSTMENT, (On Property of Penn Central Co.), 683 Broad Street, Columbus, Ohio,

Plaintiff-Appellee,

No. 72-1955 vs.

GEORGE P. BAKER, *etc., et al.,*

Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the injunctive decree of the said District Court in this cause appealed from be, and the same is hereby, REVERSED, with costs, with direction to dismiss the action, in accordance with the opinion of this Court filed this day.

APPENDIX C

In the

United States Court of Appeals

For the Seventh Circuit

March 21, 1974

Before

Hon. LUTHER M. SWYGERT, *Chief Judge*
Hon. WIN G. KNOCH, *Sr. Circuit Judge*
Hon. WILLIAM J. CAMPBELL, *Sr. District Judge*

UNITED TRANSPORTATION UNION GENERAL COMMITTEE OF ADJUSTMENT,

Plaintiff-Appellee,

No. 72-1955 vs.

GEORGE P. BAKER, *et al.*,

Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

(No. 71 C 1606)

On consideration of the petition for rehearing filed in the above-entitled cause,

IT IS HEREBY ORDERED that the petition for rehearing in the above-entitled appeal be, and the same is hereby, DENIED.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED TRANSPORTATION UNION GENERAL COMMITTEE OF ADJUSTMENT (On Property of Penn Central Company), 683 East Broad Street, Columbus, Ohio,
Plaintiff,

vs.

GEORGE P. BAKER, RICHARD C. BOND, JERVIS LANGDON, JR. and WILLARD WIRTZ, Trustees of the Property of PENN CENTRAL TRANSPORTATION COMPANY, Debtor,
Defendants.

No. 71 C 1606

MEMORANDUM OPINION AND ORDER

This is an action by a railway employees union for an injunction enjoining the railroad trustees from refusing to maintain a crew board at its Colehour Yard. The defendant trustees have filed an answer and are now moving for judgment on the pleadings.

Defendants contend that this matter is a labor grievance and hence a "minor dispute" under the Railway Labor Act, 45 U.S.C. §150 et. seq. Building on this foundation they claim that jurisdiction rests in the first instance in the Railway Adjustment Board, 45 U.S.C. §§ subd. 1 (i, m), 160, and that this court lacks jurisdiction to adjudicate this controversy. Further, it is argued that no crew board

was maintained in recent years at Colehour, that an adequate substitute system providing the same information concerning job assignments is provided, and that neither the collective bargaining agreement nor the Railway Labor Act have been violated. It is also asserted that this court cannot or should not issue an injunction to maintain or restore the status quo pending administrative mediation.

The plaintiff asserts that a form of crew board was maintained at Colehour until it was unilaterally discontinued as charged in the complaint, that the substitute system is vastly inferior, that the employees are suffering irreparable injuries, that an injunction will lie to maintain the status quo, and that the dispute is "major", leaving no administrative remedies to follow.

Thus, the court perceives two issues: whether this court has subject matter jurisdiction over the controversy which will depend on whether the dispute is "major" or "minor"; and whether defendants are entitled to judgment on the pleadings. Taking the latter point first, it is well established that judgment on the pleadings deals solely with questions of law arising from the pleadings and that all facts alleged in the complaint must be taken as true. Then, in the absence of a material question of fact, and if there has been stated no claim for relief on the undisputed facts, defendant is entitled to the requested relief. *Friedman* v. *Washburn Co.*, 145 F.2d 715 (C.C.A. 7, 1944). Facing this court is the assertion in the complaint that a crew board had been maintained at Colehour but was wrongfully discontinued in February of 1969. Defendants contradict this allegation. Thus, a material question is presented and accepting plaintiff's allegation as true, defendant cannot prevail on this motion.

However, if the court can find that the dispute is "minor", then this controversy should not continue in this forum but rather should go to the Railway Adjustment Board. A "major dispute" under 45 U.S.C. §156 is a controversy arising from the proposals for a new contract, or from changes made in existing contracts and generally arise in the absence of a collective bargaining agreement or when one side attempts to unilaterally alter the conditions of an existing contract. On the other hand, a "minor dispute" is a grievance arising from the application or interpretation of an existing collective bargaining agreement relating to the proper meaning or application of the agreement to a specific factual context. *Hilbert* v. *Pennsylvania Railroad Co.*, 290 F.2d 881 (7th Cir. 1961). After considering the arguments and authorities of the respective parties on this point, the court determines that the proper resolution of this question depends upon whether or not a crew board had been maintained at Colehour before February 1969; if it was, whether or not its use had been discontinued and from other evidence that may be presented. If the answers are in the affirmative then, without deciding the issue at this time, it is likely that the defendants attempted to alter the terms of the agreement. If the answers are in the negative then, again without deciding the issue at this time, it would appear that only a grievance is present. In the former, this court may have jurisdiction while in the latter jurisdiction would rest with the Adjustment Board. Henceforth, this jurisdictional issue depends upon the resolution of the same factual question as prevents this court from granting judgment on the pleadings. Not until an evidentiary hearing on the merits can this court determine if it has jurisdiction nor which party should prevail on the merits. The only orderly manner to handle this matter is a trial upon the merits.

Accordingly, the motion of defendants for judgment on pleadings is denied.

Enter:

/s/ Alexander J. Napoli
United States District Judge

Dated: December 8, 1971

APPENDIX E

RAILWAY LABOR ACT
(45 U.S.C. §151 et seq.)
(Excerpts)

GENERAL PURPOSES

Section 152. The purposes of the Act are: (1) To avoid any interruption to commence or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

GENERAL DUTIES

First. It shall be the duty of all carriers, their officers, agents and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

Second. All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference, between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

* * * * *

Sixth. In case of a dispute between a carrier or carriers and its or their employees, arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, it shall be the duty of the designated representative or representatives of such carrier or carriers and of such employees, within ten days after the receipt of notice of a desire on the part of either party to confer in respect to such dispute, to specify a time and place at which such conference shall be held: *Provided,* (1) That the place so specified shall be situated upon the line of the carrier involved or as otherwise mutually agreed upon; and (2) that the time so specified shall allow the designated conferees reasonable opportunity to reach such place of conference, but shall not exceed twenty days from the receipt of such notice: *And provided further,* That nothing in this Act shall be construed to supersede the provisions of any agreement (as to conferences) then in effect between the parties.

* * * * *

Section 153. First. There is hereby established, a Board to be known as the "National Railroad Adjustment Board", the members of which shall be selected within thirty days after approval of this Act, and it is hereby provided—

(a) That the said Adjustment Board shall consist of thirty-six members, eighteen of whom shall be selected by

the carriers and eighteen by such labor organizations of the employees, national in scope, as have been or may be organized in accordance with the provisions of Section 2 of this Act.

(b) The carriers, acting each through its board of directors or its receiver or receivers, trustee or trustees, or through an officer or officers designated for that purpose by such board, trustee or trustees, or receiver or receivers, shall prescribe the rules under which its representatives shall be selected and shall select the representatives of the carriers on the Adjustment Board and designate the division on which each such representative shall serve, but no carrier or system of carriers shall have more than one representative on any division of the Board.

(c) The national labor organizations, as defined in paragraph (a) of this section, acting each through the chief executive or other medium designated by the organization or association thereof, shall prescribe the rules under which the labor members of the Adjustment Board shall be selected and shall select such members and designate the division on which each member shall serve; but no labor organization shall have more than one representative on any division of the Board.

* * * * *

(h) The said Adjustment Board shall be composed of four divisions, whose proceedings shall be independent of one another, and the said divisions as well as the number of their members shall be as follows:

First division: To have jurisdiction over disputes involving train-and-yard-service employees of carriers; that is, engineers, firemen, hostlers, and outside hostler helpers, conductors, trainmen, and yard-service employees. This

division shall consist of ten members, five of whom shall be selected and designated by the carriers and five of whom shall be selected and designated by the national labor organizations of the employees.

* * * * *

(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

(j) Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them.

(k) Any division of the Adjustment Board shall have authority to empower two or more of its members to conduct hearings and make findings upon disputes, when properly submitted, at any place designated by the division: *Provided, however,* That final awards as to any such disputes must be made by the entire division as hereinafter provided.

(l) Upon failure of any division to agree upon an award because of a deadlock or inability to secure a majority vote of the division members, as provided in paragraph (n) of this section, then such division shall forthwith agree upon and select a neutral person, to be known as "referee", to sit with the division as a member thereof and make an award. Should the division fail to agree upon and select a referee within ten days of the date of the deadlock or inability to secure a majority vote, then the division, or any member thereof, or the parties or either party to the dispute may certify that fact to the Mediation Board, which Board shall, within ten days from the date of receiving such certificate, select and name the referee to sit with the division as a member thereof and make an award. The Mediation Board shall be bound by the same provisions in the appointment of these neutral referees as are provided elsewhere in this Act for the appointment of arbitrators and shall fix and pay the compensation of such referees.

(m) The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the respective parties to the controversy, and the awards shall be final and binding upon both parties to the dispute. In case a dispute arises involving an interpretation of the award the division of the Board upon request of either party shall interpret the award in the light of the dispute.

(n) A majority vote of all members of the division of the Adjustment Board shall be competent to make an award with respect to any dispute submitted to it.

(o) In case of an award by any division of the Adjustment Board in favor of petitioner, the division of the Board shall make an order, directed to the carrier, to

make the award effective and, if the award includes a requirement for the payment of money, to pay to the employee the sum to which he is entitled under the award on or before a day named.

In the event any division determines that an award favorable to the petitioner should not be made in any dispute referred to it, the division shall make an order to the petitioner stating such determination.

(p) If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be conclusive on the parties, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or

otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board: *Provided, however,* That such order may not be set aside except for failure of the division to comply with the requirements of this Act, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order.

(q) If any employee or group of employees, or any carrier, is aggrieved by the failure of any division of the Adjustment Board to make an award in a dispute referred to it, or is aggrieved by any of the terms of an award or by the failure of the division to include certain terms in such award, then such employee or group of employees or carrier may file in any United States district court in which a petition under paragraph (p) could be filed, a petition for review of the division's order. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Adjustment Board. The Adjustment Board shall file in the court the record of the proceedings on which it based its action. The court shall have jurisdiction to affirm the order of the division or to set it aside, in whole or in part, or it may remand the proceeding to the division for such further action as it may direct. On such review, the findings and order of the division shall be conclusive on the parties, except that the order of the division may be set aside, in whole or in part, or remanded to the division, for failure of the division to comply with the requirements of this Act, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order. The judgment of the court shall be subject

to review as provided in Sections 1291 and 1254 of title 28, United States Code.

(r) All actions at law based upon the provisions of this section shall be begun within two years from the time the cause of action accrues under the award of the division of the Adjustment Board, and not after.

(s) The several divisions of the Adjustment Board shall maintain headquarters in Chicago, Illinois, meet regularly, and continue in session so long as there is pending before the division any matter within its jurisdiction which has been submitted for its consideration and which has not been disposed of.

• • •

Second. Nothing in this section shall be construed to prevent any individual carrier, system, or group of carriers and any class or classes of its or their employees, all acting through their representatives, selected in accordance with the provisions of this Act, from mutually agreeing to the establishment of system, group, or regional boards of adjustment for the purpose of adjusting and deciding disputes of the character specified in this section. In the event that either party to such a system, group, or regional board of adjustment is dissatisfied with such arrangement, it may upon ninety days' notice to the other party elect to come under the jurisdiction of the Adjustment Board.

If written request is made upon any individual carrier by the representative of any craft or class of employees of such carrier for the establishment of a special board of adjustment to resolve disputes otherwise referable to the Adjustment Board, or any dispute which has been pending before the Adjustment Board for twelve months from the date the dispute (claim) is received by the Board,

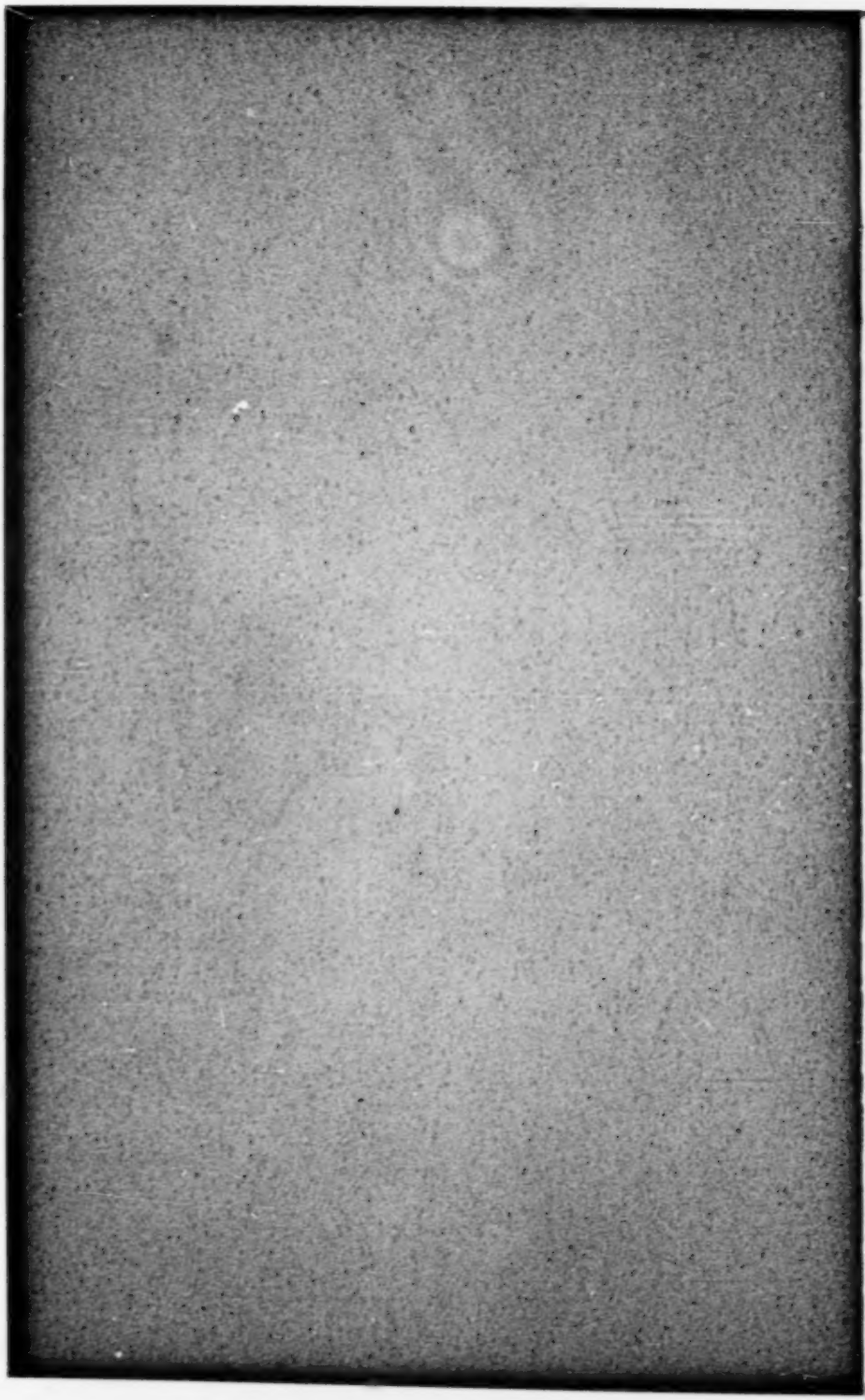
or if any carrier makes such a request upon any such representative, the carrier or the representative upon whom such request is made shall join in an agreement establishing such a board within thirty days from the date such request is made. The cases which may be considered by such board shall be defined in the agreement establishing it. Such board shall consist of one person designated by the carrier and one person designated by the representative of the employees. If such carrier or such representative fails to agree upon the establishment of such a board as provided herein, or to exercise its rights to designate a member of the board, the carrier or representative making the request for the establishment of the special board may request the Mediation Board to designate a member of the special board on behalf of the carrier or representative upon whom such request was made. Upon receipt of a request for such designation the Mediation Board shall promptly make such designation and shall select an individual associated in interest with the carrier or representative he is to represent, who, with the member appointed by the carrier or representative requesting the establishment of the special board, shall constitute the board. Each member of the board shall be compensated by the party he is to represent. The members of the board so designated shall determine all matters not previously agreed upon by the carrier and the representative of the employees with respect to the establishment and jurisdiction of the board. If they are unable to agree such matters shall be determined by a neutral member of the board selected or appointed and compensated in the same manner as is hereinafter provided with respect to situations where the members of the board are unable to agree upon an award. Such neutral member shall cease to be a member

of the board when he has determined such matters. If with respect to any dispute or group of disputes the members of the board designated by the carrier and the representative are unable to agree upon an award disposing of the dispute or group of disputes they shall by mutual agreement select a neutral person to be a member of the board for the consideration and disposition of such dispute or group of disputes. In the event the members of the board designated by the parties are unable, within ten days after their failure to agree upon the award, to agree upon the selection of such neutral person, either member of the board may request the Mediation Board to appoint such neutral person and upon receipt of such request the Mediation Board shall promptly make such appointment. The neutral person so selected or appointed shall be compensated and reimbursed for expenses by the Mediation Board. Any two members of the board shall be competent to render an award. Such awards shall be final and binding upon both parties to the dispute and if in favor of the petition, shall direct the other party to comply therewith on or before the day named. Compliance with such awards shall be enforceable by proceedings in the United States district courts in the same manner and subject to the same provisions that apply to proceedings for enforcement of compliance with awards of the Adjustment Board.

* * *

Section 156. Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said

notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not altered by the carrier until the controversy has been finally acted upon as required by Section 5 of this Act, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board.



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JUN 28 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1973.

No. 73-1885.

UNITED TRANSPORTATION UNION GENERAL COMMITTEE OF ADJUSTMENT
(On Property of Penn Central Company),
683 Board Street, Columbus, Ohio,

Petitioner,

v.

GEORGE P. BAKER, RICHARD C. BOND, JERVIS LANGDON, JR. and WILLARD WIRTZ, Trustees of the Property of PENN CENTRAL TRANSPORTATION COMPANY, Debtor,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973.

No. 73-1885.

UNITED TRANSPORTATION UNION GENERAL COMMITTEE OF ADJUSTMENT
(ON PROPERTY OF PENN CENTRAL COMPANY),
683 BOARD STREET, COLUMBUS, OHIO,
Petitioner,

v.

GEORGE P. BAKER, RICHARD C. BOND, JERVIS LANGDON, JR. AND WILLARD WIRTZ,
TRUSTEES OF THE PROPERTY OF
PENN CENTRAL TRANSPORTATION COMPANY,
DEBTOR,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

OPINION BELOW.

The opinion below has not been officially reported. It is unofficially reported at 85 L.R.R.M. 2526, and at 73 Labor Cases (CCH) ¶14,336.

QUESTION PRESENTED.

Whether the Court of Appeals applied the proper legal standard in holding that the dispute (concerning maintenance of certain "crew boards") which had arisen in this case was a dispute as to the interpretation or application of a collective agreement entered into under the Railway Labor Act, that is to say a "minor" dispute; and in concluding that the District Court had no jurisdiction to issue a permanent injunction against an alleged violation of the agreement.

STATEMENT OF THE CASE.

The material facts of the case are succinctly stated in the opinion of the Court of Appeals (Petition, Appendix A at pages 2a-4a).

ARGUMENT.

Petitioner urges this Court to exercise its discretion under Rule 19 to issue a writ of certiorari in the present case, based on the assertion of a direct conflict between the decision in this case and that of the Court of Appeals for the Sixth Circuit in *United Transportation Union, Local 63E v. Penn Central Company,* 443 F.2d 131 (1971), cert. den. 404 U.S. 938.

It is true that the Seventh Circuit refused to follow the decision of the Sixth Circuit in a "crew board" case which was similar on its facts, although Respondents feel there are substantial differences in the agreements involved in the two cases, which will be briefly discussed later. Indeed, these Respondents sought review of the Sixth Circuit case in 1971 on the ground, among others, that that decision was contrary to established law in the Seventh and other Circuits. No. 71-266, certiorari denied, 404 U.S. 938.

However, any conflict involving a principle of law between the two "crew board" cases has been obviated by a subsequent decision of the Sixth Circuit. In *Local 1471, United Transportation Union v. Baker,* 482 F.2d 228 (1973), an action to enjoin an alleged violation of a railroad collective agreement, the Sixth Circuit adopted the following legal test as to whether the dispute before it was to be classified as "major" or "minor", at page 230:

> "However, difficulty arises when, as in this case, one party views the controversy as a dispute over the proper interpretation of the existing contract and agreed rules, while the other charges its adversary with an attempt to impose unilaterally a new requirement that changes the existing agreement. Confronted by such opposing characterization of particular disputes, the courts of appeals have consistently ruled that if

the disputed action of one of the parties can 'arguably' be justified by the existing agreement or, in somewhat different statement, if the contention that the labor contract sanctions the disputed action is not 'obviously insubstantial', the controversy is within the exclusive province of the National Railroad Adjustment Board. Railway Express Agency v. Brotherhood of Railway, Airline and Steamship Clerks, 5th Cir. 1971, 459 F.2d 226, 231, cert. denied 409 U.S. 892, 93 S. Ct. 115, 34 L. Ed. 2d 149 ('arguable'); Switchmen's Union v. Southern Pacific Co., 9th Cir. 1968, 398 F.2d 443, 447 ('arguably predicated on the terms of the agreement'); Airline Stewards Assn. v. Caribbean Atlantic Airlines, Inc., 1st Cir. 1969, 412 F.2d 289, 291 (not 'obviously insubstantial'); Southern Ry. Co. v. Brotherhood of Locomotive Firemen and Enginemen, 1967, 127 U.S. App. D.C. 371, 384 F.2d 323, 327 (not 'obviously insubstantial'). In our view, the concept expressed in these formulations is sound. We apply it to this case."

In support of this most recent holding, as may be noted, the Sixth Circuit relied on three of the same cases (those from the First, Ninth and District of Columbia Circuits) as were relied on by the Seventh Circuit in the decision here appealed from, namely *Airline Stewards Association v. Caribbean Atlantic Airlines, Southern Railway Company v. Brotherhood of Locomotive Firemen and Enginemen,* and *Switchmen's Union v. Southern Pacific Company.* In addition, the Sixth Circuit relied upon a similar case from the Fifth Circuit, *Railway Express Agency v. Brotherhood of Railway, Airline, and Steamship Clerks.* All these cases are cited in the preceding quotation.

The result is that the principles of law as applied by the Sixth Circuit have been brought into harmony with those applied by the Seventh Circuit in the present case,

and by other circuits referred to. Any apparent conflict as to applicable legal principles between the two "crew board" cases has thus been obviated.

Respondents further suggest that there is a substantial difference between the facts of the two cases, even though Petitioner contends, and the Seventh Circuit admittedly stated, that they were "in all relevant aspects identical". Notwithstanding these statements, the collective agreement in question in the Seventh Circuit case contained a provision respecting crew boards which differs substantially from that in the Sixth Circuit case.

The applicable contractual provision applying to firemen in the Sixth Circuit case was as follows:

> "5-B-2. Crew boards (h). Crew boards showing the order in which crews are to go out will be maintained. Boards of regular and extra hostlers will also be maintained." 443 F.2d 132

The relevant provision applying to trainmen in the Seventh Circuit case was as follows:

> "8-B-1. Crew boards. Crew boards showing the order in which crews are to go out shall be maintained. At outlying points where a crew board attendant is not on duty throughout an entire calendar day, arrangements shall be made so that trainmen desiring information as to their standing on the crew shall be furnished such information." Petition, Appendix A, pp. 2a-3a.

The second sentence of the rule 8-B-1 just quoted obviously gives the railroad greater latitude than rule 5-B-2 first quoted with respect to making arrangements other than crew boards to keep trainmen advised of their standing where no crew board attendant is on duty. Thus rule 8-B-1 offered a strong basis for the Seventh Circuit's deci-

sion accepting the railroad's position that only a dispute as to an application of this provision was involved, and holding that the railroad's position was not frivolous or wholly without basis. The different result in the two decisions can be explained, not as a conflict of legal principles, but as a difference in the manner in which the respective Courts of Appeal evaluated the facts of the cases before them.

Be that as it may, in view of the later decision of the Sixth Circuit, it is obvious that the Sixth Circuit itself has limited its earlier holding to the facts there involved, and that the Sixth Circuit finds itself in accord with the established law as applied by the Seventh Circuit in the case here under appeal.

Respondents have referred to the reliance by both the Sixth and Seventh Circuits on similar holdings in the First, Ninth, and District of Columbia Circuits. The Court's attention is further called to the fact that similar principles have been followed in other Circuits in the following cases: *Gainey v. Brotherhood of Railway and Steamship Clerks,* 275 F.2d 342 (3d Cir., 1960); *Hudie v. Aliquippa and Southern R.R.,* 360 F.2d 213 (3d Cir., 1966); *Switchmen's Union v. Central of Georgia Railroad,* 341 F.2d 213 (5th Cir., 1965), cert. den. 382 U.S. 841; *United Transportation Union v. Burlington Northern, Inc.,* 458 F.2d 354 (8th Cir., 1972).

Petitioner argues briefly that aside from the alleged conflict between the circuits, the decision below threatens to "destroy" the status quo provisions of the Railway Labor Act. It is asserted that the decision below means that the courts cannot "make some initial evaluation of the facts to determine whether the [railroad's] defense is in fact frivolous or substantial." Petition pg. 12-13. Of course the Court of Appeals made no such ruling. It did examine the facts of record and determined that the rail-

road had a substantial basis for its position that the dispute presented was a "minor dispute".

It justly refused to follow the path taken by the District Court (and affirmed by the Sixth Circuit) in the earlier crew board case of applying the existing agreement to the facts in the case and then proceeding to decide the merits of the minor dispute. Petitioner agrees that such a procedure is wrong. "It is well understood that the courts must not undertake to interpret the agreement." Petition, pg. 14. "The Courts have no jurisdiction to enjoin a change in the status quo in a minor dispute situation." Petition, pg. 10.

The "status quo" provisions of the Railway Labor Act, Section 6 in particular, 45 U.S.C. § 156, are not involved in grievance situations and would have no relevance in a "minor dispute" until such time as an adjustment board of competent jurisdiction had decided that the railroad had violated the collective agreement. *Order of Railway Conductors v. Pitney,* 326 U.S. 561 (1946), at page 565; *Detroit, Toledo and Shore Line RR v. United Transportation Union,* 396 U.S. 142 (1969), see especially pages 156-157, where the Court comments on *Pitney.*

Petitioner's concern for Section 6 of the act is consistent with its assumption, which has been made from the beginning of the case, that the union was correct in its position as to the meaning of the collective agreement, and that therefore the railroad was "changing" the agreement. All that has happened here is that the Court of Appeals found that the basic contractual dispute was for the adjustment boards, not the courts, a proposition which has been repeatedly emphasized by this Court. *Slocum v. Delaware Lackawana and Western RR,* 339 U.S. 239 (1950); *Pennsylvania RR v. Day,* 360 U.S. 548 (1959); *Union Pacific RR v. Price,* 360 U.S. 601 (1959); *Andrew v. Louisville and Nashville RR,* 406 U.S. 320 (1972).

CONCLUSION.

The decision of the Court of Appeals is not in conflict with the law as stated by the Court of Appeals for the Sixth Circuit, in view of the fact that the Sixth Circuit has adopted similar legal principles in a case subsequent to that with which the conflict is asserted to exist. The decision below represents an application of widely followed principles to the facts of a particular case. Therefore, Respondents urge that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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